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Brief of Fred T. Korematsu Center for Law and Equality as Amicus Curiae in Support of Raymond Williams

Fred T. Korematsu Center for Law and Equality

NO. 49894-4

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION II

In re the Personal Restraint Petition of

RAYMOND MAYFIELD WILLIAMS, JR.,

Petitioner.

BRIEF OF FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF RAYMOND WILLIAMS

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The statement of identity and interest of *amicus* is set forth in the Motion for Leave to File that was filed on February 28, 2018.

INTRODUCTION

Mr. Williams is serving a life without parole sentence based, in part, on a burglary conviction committed when he was sixteen.[1] Without this counting as the first of three strikes, he would have faced a standard range sentence of 53 – 70 months. *See* Br. of Pet'r, Appendix "A" (Judgment and Sentence, Cowlitz County Superior Court, Cause No. 08-1-00735-6). Instead, the sentencing court had no choice but to count the juvenile conviction as a strike under Washington's Persistent Offender Accountability Act (POAA), RCW 9.94A.555, .570, a sentencing scheme that became law in 1994,[2] long before the sea change of *Roper*,[3] *Graham*,[4] *Miller*,[5] and *Montgomery*,[6] as well as this Court's extension of *Miller* and *Graham* in *State v. Bassett*, 198 Wn. App. 714, 349 P.3d 430 (2017), *review granted*, 402 P.3d 827 (2017) (argued Feb. 22, 2018). *Graham* and *Miller*—as well as this Court's article I, section 14 jurisprudence

[1] Mr. Williams waived his declination hearing. Br. of Pet'r at 1.
[2] The law was created by Initiative No. 539. *See* RCW 9.94A.555.
[3] *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).
[4] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).
[5] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).
[6] *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

recognizing that the intrinsic nature of youth undercuts the penological justifications for imposing the harshest sentences—require this Court to engage with the constitutional dilemma that arises when the POAA *requires* a sentencing court to impose life without the possibility of parole on a defendant who committed one or more strike offenses as a juvenile.

Recognizing the constitutional dimensions of Mr. Williams' case, this Court requested on December 1, 2017, that counsel address at oral argument whether "using a conviction that was committed when an individual was under the age of 18 years old as a strike in a persistent offender case violate[s] the prohibition against cruel and unusual punishment?" *Amicus* demonstrates that the developments in juvenile justice jurisprudence on both the federal and state level must be recognized and integrated into review of a life sentence under the POAA where a defendant committed one or more strike offenses as a juvenile. The POAA as applied to Mr. Williams results in a mandatory sentencing scheme under which the sentencing court cannot consider the defendant's youth and its attendant characteristics, in violation of the federal and state constitutions.

SUMMARY OF ARGUMENT

First, *amicus* explains that courts reviewing the constitutionality of a life without parole sentence imposed under a recidivist statutory scheme

routinely consider all strikes as part of the current offense. With respect to the constitutional question posed, *amicus* explains how Mr. Williams' life without parole sentence runs afoul of the principles on which *Graham* and *Miller* were decided. *Graham* not only barred the imposition of life without parole on juvenile nonhomicide offenders, but also stands for the larger principle that courts must closely scrutinize harsh punishments imposed on juveniles, due to their diminished moral culpability. And *Miller* prohibits mandatory life with parole sentencing schemes for juvenile homicide offenders, as those schemes deprive courts of the opportunity to consider the mitigating qualities of youth. Together, *Graham* and *Miller* lead to the conclusion that a three strikes law that imposes life without parole based, in part, on conduct committed as a juvenile, is unconstitutional.

Second, *amicus* explains how Mr. Williams' life without parole sentence is unconstitutional under article I, section 14. This Court adopted a categorical bar on juvenile life without parole in *Bassett* because traditional proportionality analysis under *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980), does not "adequately address the special concerns inherent to juvenile sentencing." *Bassett*, 198 Wn. App. ¶ 49. While Mr. Williams was not a juvenile at the time of the third strike, his age at the time of the first strike is material to the larger constitutional inquiry, as

those same "special concerns" are at play. The only way to avoid the risk that harsh punishment might be imposed on those whose strike offenses reflect transient immaturity is to adopt a corollary of the categorical bar on juvenile life without parole: that no offense committed as a juvenile can count as a strike.

ARGUMENT

I. WASHINGTON COURTS HAVE LONG CONSIDERED ALL STRIKES IN REVIEWING A LIFE SENTENCE UNDER PERSISTENT OFFENDER SENTENCING SCHEMES.

In Washington, long-standing precedent demonstrates that a court reviewing the constitutionality of a life without parole sentence imposed under a persistent offender statute considers all strikes that underlie the sentence.[7] In the watershed case of *Fain*, in which our supreme court considered the proportionality of a life sentence under the habitual offender statute in effect in 1980, the court looked at the nature of "*each of the crimes that underlies his conviction as a habitual offender*" in determining whether Mr. Fain's sentence was proportional. 94 Wn.2d at 397-98 (emphasis added) (citing *Rummel v. Estelle*, 445 U.S. 263, 295,

[7] This Court requested supplemental briefing on November 15, 2017, on the issue of whether Mr. Williams may collaterally attack his 1997 conviction. While the parties have ably responded to the Court's inquiry, *amicus* provides a brief discussion of how consideration of all strike offenses is necessary at the time a court sentences a defendant under a persistent offender statutory scheme.

100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980) (Powell, J., dissenting)) (considering that each of the crimes underlying his life without parole sentence were victimless and involved fraud to obtain small sums of money). Rather than amounting to a collateral attack on the earlier strike convictions, the consideration of the conduct underlying the prior strike convictions is—and has been—central to proportionality review under article I, section 14. Failure to scrutinize Mr. Williams' prior strikes would be an abdication of this Court's duty to ensure that a life without parole sentence does not violate either the Eighth Amendment or article I, section 14, and that analysis necessarily encompasses a consideration of *all* criminal conduct that forms the basis for a life without parole sentence under the POAA.

II. THE PERSISTENT OFFENDER ACCOUNTABILITY ACT LEAVES SENTENCING COURTS WITH NO DISCRETION TO CONSIDER THE MITIGATING QUALITIES OF YOUTH, IN VIOLATION OF THE EIGHTH AMENDMENT.

While *Roper*, *Graham*, and *Miller* reflect a sea change in the sentencing of juvenile offenders, the principles on which the Supreme Court rested its holdings apply with equal force when an adult sentencing scheme imposes harsh punishment based, in part, on past juvenile criminal conduct. *Amicus* discusses these principles to demonstrate that a life

without parole sentence under the POAA cannot rest upon a conviction for a crime committed as juvenile.[8]

A. The Principles that Drove the Decision in *Graham* Apply in Other Sentencing Contexts Where Punishment Is Imposed Because of Juvenile Criminal Conduct.

In *Graham*, the Court held life without parole for juvenile nonhomicide offenders was categorically barred.[9] 560 U.S. at 82. It explained that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Id.* at 76. In determining that life without

[8] Consideration of this constitutional argument does not raise the problem of a mixed petition. *Cf. In re Hankerson*, 149 Wn.2d 695, 697, 72 P.3d 703 (2003) (if a PRP filed after the one year period expires contains multiple claims, and one or more of the claims is time barred, the entire petition must be dismissed as a mixed petition). Here, neither argument is time-barred. Mr. Williams' jurisdictional argument is not subject to the one year bar, as he alleged that the Thurston County Superior Court sentence imposed for first degree burglary in 1997 was "in excess of the court's jurisdiction," RCW 10.73.100(5), as that court's failure to conduct a declination hearing and make findings on the record deprived that court of jurisdiction to sentence him. Br. of Pet'r at 5-7. Mr. Williams has alternatively argued that the failure to conduct a declination hearing and make findings on the record renders the one year time bar inapplicable, because 1997 judgment and sentence for the burglary conviction is not "valid on its face and…[was not] rendered by a court of competent jurisdiction." RCW 10.73.090. Br. of Pet'r at 20. Nor is the argument that RCW 9.94A.570 is unconstitutional as applied to Mr. Williams subject to the one year bar of RCW 10.73.090. RCW 10.73.100(2) (one year bar does not apply if defendant's petition is based on argument that the statute "defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct.").

[9] The categorical proportionality analysis begins with objective indicia of national consensus with regard to the sentencing practice in question, *Graham*, 560 U.S. at 62, and then requires judicial exercise of independent judgment to consider the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question," *id.* at 67. Categorical proportionality also examines the penological justifications for the sentencing practice, including incapacitation, deterrence, retribution, and rehabilitation. *Id.* at 71.

parole was categorically barred for juvenile nonhomicide offenders, the *Graham* court relied on juveniles' lessened culpability and noted that a juvenile's transgression "is not as morally reprehensible as that of an adult." *Id.* at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (plurality opinion)). The *Graham* Court affirmed that "[i]t remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult." *Id.* at 68 (quoting *Roper*, 543 U.S. at 570).

The Supreme Court's decision to ban juvenile life without parole for juvenile nonhomicide crimes is based on "these fundamental differences [that] cannot logically be limited to the analysis of some legal issues but not others because these are fixed characteristics of adolescence." Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes As Cruel and Unusual Punishment*, 46 U.S.F. L. Rev. 581, 604 (2012). Indeed, the Supreme Court has relied on its conclusions regarding the fixed characteristics of adolescence, recognizing the relevance of age in conducting the *Miranda*[10] custody analysis. *J.D.B. v. North Carolina*, 564 U.S. 261, 264–65, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). The Court's decision in *J.D.B.* "reflects a commitment to its

[10] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

conclusions regarding the nature of adolescence and a willingness to apply research regarding characteristics of adolescents to constitutional legal issues impacting this population." *Caldwell*, *supra* at 605.

Like the sentencing procedures in *Graham*, the POAA is a sentencing procedure that fails to take youth into account, in contravention of *Graham*. And as the *J.D.B.* Court noted, there is no need to revisit the underpinnings of the "commonsense conclusions" about the nature of juveniles. 564 U.S. at 272 (finding no reason to "reconsider" the observations about the common "nature of juveniles" (quoting *Graham*, 560 U.S. at 68)). Instead, it is the duty of courts to consider the application of these commonsense conclusions in new contexts, and *amicus* urges the Court to do exactly that in Mr. Williams' case. The central principle in *Graham*—that juveniles are intrinsically less culpable than adults—casts significant doubt on the constitutionality of using a strike committed as a juvenile to support a life without parole sentence. *See Caldwell*, *supra*, at 605 (noting that it would be "inconsistent to ignore [*Graham*'s] conclusions in the legal analysis of the constitutionality of using juvenile strikes").

B. The POAA Is a Mandatory Sentencing Scheme that Removes Youth from the Balance, in Violation of *Miller*'s Central Principle that Youth Mitigates Culpability.

Miller teaches that courts must give exacting scrutiny to mandatory penalty schemes that impose punishment without appropriate consideration of youthfulness. *See generally* 567 U.S. 460. The *Miller* Court extended its holdings in *Roper* and *Graham* to hold that "penalty schemes" that include mandatory life-without-parole sentences for juveniles violate the Eighth Amendment because they impose harsh sentences without appropriate consideration of the youthfulness of the defendant. *Id*. at 474. "By removing youth from the balance," the mandatory schemes the Court invalidated "prevent[ed] the sentencer from taking into account [the] central considerations" identified in *Graham*. *Id.* Because of juveniles' lessened moral culpability and enhanced prospect of reformation, the penological justifications for imposing the harshest sentences on juveniles are diminished. *See id.* at 472.

The POAA is a mandatory penalty scheme that imposes punishment without appropriate consideration of youthfulness of one or more of the strikes, in contravention of *Miller*'s central principle. While it is indisputable that Mr. Williams was sentenced to life without parole when he was an adult, the reach of *Miller* cannot be so easily limited. The sentence imposed on Mr. Williams is as much a punishment for the first

strike committed at the age of sixteen as it is for the other two strikes committed as an adult. But under the POAA, the trial court had no discretion to consider the characteristics of youth that undercut the justification for imposing the harshest sentence short of capital punishment. *Miller* therefore counsels that Mr. Williams should not serve a life sentence based, in part, on criminal conduct committed as a juvenile.

Some federal courts have applied the principles in *Roper*, *Graham*, and *Miller* to recidivist statutes, recognizing the diminished culpability of juvenile offenders in this context. In *United States v. Howard*, 773 F.3d 519, 529, 531-32 (4th Cir. 2014), the court determined that the life sentence imposed under the de facto career offender provision of the federal sentencing guidelines was substantively unreasonable, because some of the predicate convictions were committed when Howard was between sixteen and eighteen. The trial court had based its upward departure on Howard's conviction, at the age of sixteen, for selling cocaine to an undercover officer, and on his conviction, at the age of eighteen to voluntary manslaughter.[11] *Id.* at 529. Invoking *Miller*, *Graham*, and *Roper*, the court vacated Howard's sentence as substantively

[11] Other juvenile criminal convictions the trial court noted were providing fictitious information to a police officer, when Howard was seventeen, and second degree trespass and possession of cocaine, although these did not appear to be the basis on which the trial court justified its upward departure. *Id.* at 531.

unreasonable, relying on the Supreme Court's recognition of "the diminished culpability of juvenile offenders, given their lack of maturity, vulnerability to social pressures, and malleable identities." *Id.* at 532 (citing *Miller*, 567 U.S. at 471; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70). The court criticized the district court's sentence for its failure to appreciate "what we cannot ignore…that youth is a 'mitigating factor derive[d] from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" *Id.* (quoting *Roper*, 543 U.S. at 570 (citation and internal quotation marks omitted)).[12]

[12] Other federal courts, deciding cases before *Miller*, have reached different results. *United States v. Graham*, 622 F.3d 445, 457 (6th Cir. 2010) (determining a prior felony drug conviction committed when defendant was seventeen counted as qualifying felony under the three-strikes provision of the Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A)); *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010) (same). Both the *Graham* court and the *Scott* court unpersuasively distinguished *Graham v. Florida* based on the fact that the defendants were adults at the time of the commission of the third strike offense. *Graham*, 622 F.3d at 462 (noting that Graham was an adult when he received the mandatory life term); *Scott*, 610 F.3d at 1018 (same). The juvenile defendants in both *Roper* and *Graham* were charged, tried, and convicted as adults. *Graham*, 560 U.S. at 53 ("Graham's prosecutor elected to charge Graham as an adult."); *Roper*, 543 U.S. at 557 ("[Simmons] was tried as an adult.").

The dissent in *United States v. Graham*, however, foreshadowed the Fourth Circuit's result in *Howard*, arguing that the majority's decision "violates sound principles of penological policy based on the Eighth Amendment values recently outlined by the Supreme Court in *Graham v. Florida*," 622 F.3d at 465 (Merrit, J., dissenting), and that *Graham* "should at least make our court and the court system more sensitive to the important distinction between juvenile and adult criminal conduct," *id.* at 469.

Further, our Supreme Court's decision in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), signals that Washington courts will interpret the Eighth Amendment to ensure that the principles that drove the specific holdings in *Roper*, *Graham*, and *Miller* continue to have vitality in sentencing contexts not originally addressed by those specific cases.[13] The court in *Houston-Sconiers* expanded *Miller* by declaring that a court's ability to fully address the mitigating qualities of youth requires absolute discretion to depart from sentencing guidelines (including the mandatory sentencing enhancements specifically at issue in the case) when sentencing juveniles to lengthy sentences under adult sentencing schemes. 188 Wn.2d at 21.

III. ARTICLE I, SECTION 14 IS MORE PROTECTIVE THAN THE EIGHTH AMENDMENT IN THE JUVENILE SENTENCING CONTEXT, AND SO SHOULD NOT PERMIT OFFENSES COMMITTED AS A JUVENILE TO COUNT AS A STRIKE.

While Eighth Amendment jurisprudence brings into relief the constitutional infirmity of sentencing Mr. Williams to life without parole

[13] In *State v. O'Dell*, 183 Wn.2d 680, 688–98, 358 P.3d 359 (2015), this Court further extended *Miller* when it allowed the youth of an adult offender to be considered as a justification for departures below the standard sentencing range, in recognition that the juvenile brain is not fully developed by the age of eighteen. *See also Bassett*, 198 Wn. App. ¶ 46 (discussing *O'Dell*). While Mr. Williams' second strike was not committed when he was a juvenile, Mr. Williams was still youthful—23 years old—at the time of his 2004 strike offense. *O'Dell*, 183 Wn.2d at 695 (noting studies suggesting that the diminished culpability of youth is applicable until age 25, when the juvenile brain matures); Reply Br. of Pet'r, App'x B.

based in part on a crime committed as a juvenile, the infirmity is even more pronounced under the more protective article I, section 14. Article I, section 14 jurisprudence explicitly forbids the risk of imposing life without parole on those whose crimes reflect transient immaturity, and it is under article I, section 14 that the resolution is found. A corollary to the categorical bar on juvenile life without parole announced in *Bassett* is that no strike offense committed as a juvenile may count as a strike under the POAA.[14]

A. Article I, Section 14 Is More Protective than the Eighth Amendment.

Our state constitution robustly protects against cruel punishment, *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014), and implicit in that protection is the continuing duty of Washington courts to develop article I, section 14 jurisprudence to ensure that it remains more protective than the Eighth Amendment. And since our supreme court in *Fain* declared article I, section 14 to be more protective, 94 Wn.2d at 392–93, Washington courts have continued to so hold in a variety of sentencing

[14] This Court could determine that the practice of allowing one or more strike offense committed as a juvenile to support a life without parole sentence under the POAA violates the Eighth Amendment. However, *amicus* urges this Court to do so specifically under *Bassett* and article I, section 14. *Michigan v. Long*, 463 U.S. 1032, 1041-42, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

contexts.[15] So while there is disagreement among federal courts as to whether strike offenses committed as juveniles may count as strikes, *supra* at 10-11, there is ample room to reach a different, more protective rule under article I, section 14. *Cf. Bassett*, 198 Wn. App. at ¶ 18.

B. *Fain* Proportionality Review Does Not Take into Account the Youth of the Offender, in Violation of *Miller*, *Graham*, and Article I, Section 14.

Proportionality analysis under *Fain*,[16] 94 Wn.2d 387, considers the crime and the sentence, but does not technically take into account the

[15] For persistent offender cases, see *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); *State v. Rivers*, 129 Wn.2d 697, 712, 921 P.2d 495 (1996); *State v. Thorne*, 129 Wn.2d 736, 772, 921 P.2d 514 (1996). For death penalty cases, see *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000); *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984). For consecutive sentences, see *Wahleithner v. Thompson*, 134 Wn. App. 931, 936, 143 P.3d 321 (Div. I 2006). For cases indirectly supporting the conclusion that article I, section 14 provides greater protection than the Eighth Amendment, see *In re Rupe*, 115 Wn.2d 379, 396 n.5, 798 P.2d 780 (1990) (in the death penalty context, noting article I, section 14's greater protection); *In re Johnston*, 99 Wn.2d 466, 478, 663 P.2d 457 (1983) (in a medical license denial case, citing *Fain* as an example of article I, section 14 providing broader protection than the Eighth Amendment); *State v. Grenning*, 142 Wn. App. 518, 545–46, 174 P.3d 706 (Div. II 2008) (performing a *Fain* analysis in the consecutive and concurrent sentencing context to determine whether the sentence violated article I, section 14 and the Eighth Amendment); *In re Haynes*, 100 Wn. App. 366, 375–76, 996 P.2d 637 (Div. I 2000) (in the exceptional sentencing context, indirectly affirming the proposition by performing a *Fain* analysis to determine whether the sentence violated both article I, section 14 and the Eighth Amendment).

[16] *Fain* proportionality analysis considers whether a particular punishment is disproportionate to the crime. 94 Wn.2d at 397–401. That four-factor test examines 1) the nature of the offense, 2) the legislative purpose behind the statute, 3) the punishment the defendant would have received in other jurisdictions for the same offense, and 4) the punishment meted out for other offenses in the same jurisdiction. *Id.*; *cf. State v. Rivers*, 129 Wn.2d 697, 713, 921 P.2d 495 (1996) (replacing the second factor with "the legislative purpose behind the statute" when the test is used outside the habitual offender context).

personal characteristics of the *offender*, as required by *Miller*. 567 U.S. at 470–79. As this Court noted in *Bassett*, the first *Fain* factor focuses on the characteristics of the crime, and not, as *Miller* requires, on the mitigating qualities that flow from the offender's youth. *Bassett*, 198 Wn. App. at 738 (citing *Fain*, 94 Wn.2d at 397-98). This Court similarly noted that the fourth *Fain* factor, which considers the punishment meted out in other jurisdictions, conflicts with *Miller* because it "allows comparison with the punishment for *adult* offenders who commit the same crimes." *Id.* (emphasis in original). Because *Fain* proportionality analysis does not allow for consideration of the mitigating qualities of youth, applying this analysis to life without parole sentences based in part on juvenile strike offenses would violate *Miller* and the Eighth Amendment, in addition to article I, section 14.

C. This Court's Independent Judgment Analysis from *Bassett* Yields a Corollary of the Categorical Bar Against Juvenile Life Without Parole.

This Court has taken the important step of recognizing that article I, section 14 is more protective in the juvenile sentencing context by categorically barring juvenile life without parole, fully embracing the precept that "children are constitutionally different" and acting to address the significant risks of applying adult sentencing procedures to juveniles.

Because this Court's categorical bar analysis[17] in *Bassett* largely informs the analysis here, *amicus* discusses the emerging national consensus against use of juvenile strikes to support sentencing enhancements and argues that this Court's independent judgment is every bit as salient to this particular sentencing context as it was to the *Miller*-fix statute at issue in *Bassett.*

i. *National consensus*

Professor Beth Caldwell's recent analysis of whether states with harsh recidivist statutes[18] permit the use of juvenile adjudications as prior convictions to enhance sentences under recidivist statutory schemes determined that such a national consensus exists. Caldwell, *supra*, at 617-25. As of 2012, ten states explicitly exclude use of juvenile adjudications as prior convictions for three strikes sentencing. *Id.* at 619 n.240 (citing jurisdictions). Ten additional jurisdictions' statutes "most likely prohibit the use of juvenile adjudications as strikes." *Id.* at 619 n.241. Thirteen

[17] Washington's categorical bar analysis determines whether a particular punishment against a certain class of people is constitutionally barred given the nature of the offense or the characteristics of that class of offenders. *State v. Schmeling*, 191 Wn. App. 795, 799, 365 P.3d 202 (2015). This two-step analysis considers 1) whether there is a national consensus against the sentencing practice at issue, and 2) the independent judgement of the court, based on its precedent, as to whether the punishment is unconstitutional. *See id.* at 799–800.

[18] Defined as allowing sentences anywhere from 15 years to life. Caldwell, *supra* at 618. Other jurisdictions have less severe statutory schemes that permit judicial discretion or impose far less severe sentences. *Id.*

additional states appear to prohibit the use of juvenile adjudications as strikes through case law. *Id.* at 620 n.244. In total, as of 2012, thirty-three states most likely prohibit the use of juvenile adjudications to count as "strikes."

While states' approaches to use of adult convictions of juvenile offenders count as strikes vary more than the use of juvenile adjudications, Caldwell notes that there may be an "emerging national consensus against using adult convictions of juvenile offenders for sentencing enhancements." *Id.* at 628; *see also Roper*, 543 U.S. at 566 (it is the "consistency of the direction of change" rather than a static examination of the law at any particular point that is relevant (quoting *Atkins v. Virginia*, 536 U.S. 304, 315, 122 S. Ct. 2442, 153 L. Ed. 2d 335 (2002)). In 2012, Caldwell identified at least eight jurisdictions that "prohibit or limit the circumstances under which convictions of juvenile offenders in adult court may be used for future sentencing enhancement under three strikes laws." *Id.* at 628 n.282.[19] Since then, at least one state, Wyoming, as part of its

[19] These eight jurisdictions break down into two categories. Kentucky, New Jersey, New Mexico, North Dakota, and Oregon expressly limit or exclude the use of juvenile convictions as strikes. Ky. Rev. Stat. Ann. § 532.080(2)(b), 3(b) (West 2012); N.J. Stat. Ann. § 2C:44-7 (West 2005); N.M. Stat. Ann. § 31-18-23(C) (2010); N.D. Cent. Code § 12.1-32-09 (1997 & Supp. 2011); Or. Rev. Stat. Ann. § 161.725 (2011). Alabama, New York, and Wisconsin do not allow the use of youthful offender convictions of juveniles in adult court as strikes. *Ex parte Thomas*, 435 So. 2d 1324, 1326 (Ala. 1982); N.Y. Penal Law § 60.10 (McKinney 2009); *State v. Geary*, 95 Wis. 2d 736, 289 N.W.2d 375, 1980 WL 99313 (Ct. App. 1980).

Miller fix statute, not only eliminated juvenile life without parole, but also excluded convictions of juveniles in adult court from counting as strike offenses under its habitual offender statute. Wyo. Stat. Ann. § 6-10-201(b)(ii) (2013) (permitting life without parole for three strikes only after three or more previous convictions for "offenses committed after the person reached the age of eighteen (18) years of age."); *see also* 2013 Wyo. Sess. Laws 75 (showing *Miller* fix along with revision to habitual offender statute).[20]

The determination of a national consensus is not determinative of whether a practice violates article I, section 14. *Bassett*, 198 Wn. App. ¶ 52. Rather, the Court also employs its independent judgment.

ii. Independent judgment

In "exercising independent judgment, we consider 'the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.'" *Id.* ¶ 32 (quoting *State v. Lyle*, 854 N.W.2d 378, 386 (Iowa 2014) (quoting *Graham*, 560 U.S. at 67). In *Bassett*, this Court's independent judgment of whether article I, section 14 permitted juvenile life without parole focused on the "unacceptable risk that juvenile offenders whose crimes reflect transient

[20] http://legisweb.state.wy.us/2013/Session Laws.pdf.

immaturity will be sentenced to life without parole or early release because the sentencing court mistakenly identifies the juvenile as one of the uncommon, irretrievably corrupt juveniles." *Id.* ¶ 59. While the POAA does not give sentencing courts any discretion to consider whether a juvenile strike reflects the "uncommon, irretrievably corrupt juvenile[]", *id.*, the exercise of that discretion in the POAA context would lead to the same risk already identified as unacceptable. Therefore, the only way to ensure that Mr. Williams, and others like him who committed strike offenses as juveniles, do not end up serving life without parole based in part on "crimes [that] reflect transient immaturity," *id.*, is to adopt the corollary proposed by *amicus*: that no juvenile strike offense may count as a strike under the POAA.[21]

CONCLUSION

Amicus respectfully argues that *Graham* and *Miller*, together with our more protective article I, section 14, counsel that any time juvenile conduct triggers adult sentencing schemes, judicial scrutiny is required to ensure that the harshest of punishments are not imposed on those who are inherently less culpable. *Amicus* suggests that this Court's decision in *Bassett* obviates the need for a formal categorical bar analysis in Mr.

[21] This would also be a logical extension of Washington law that does not allow juvenile adjudications to count as strikes. RCW 9.94A.030(35), (38); *see also State v. Knippling*, 166 Wn.2d 93, 98-102, 206 P.3d 332 (2009).

Williams' case. Instead, if the principles of the diminished culpability of youth are to have continuing vitality, those same principles that drove adoption of the categorical bar against life without parole in *Bassett* lead to a corollary of the categorical rule here—that under article I, section 14, no offense committed as a juvenile can count as a strike.

RESPECTFULLY SUBMITTED this 22nd day of March, 2018.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on March 22, 2018, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 22nd day of March, 2018.

s/ Jessica Levin

Jessica Levin
Counsel for *Amicus Curiae*
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